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17 UNITED STATES DISTRICT COURT
18
19 NORTHERN DISTRICT OF CALIFORNIA
20
21 SAN FRANCISCO DIVISION

22 MICHAEL E. DAVIS, aka TONY DAVIS,
23 VINCE FERRAGAMO, and BILLY JOE
24 DUPREE, on behalf of themselves and all
25 others similarly situated,

26 Plaintiffs,

27 vs.

28 ELECTRONIC ARTS, INC.,
Defendant.

CASE No. 10-cv-3328 RS (DMR)

**PLAINTIFFS' REQUEST FOR JUDICIAL
NOTICE IN SUPPORT OF OPPOSITION
TO ELECTRONIC ARTS, INC.'S
MOTION TO DISMISS AND MOTION TO
STRIKE**

Date: January 26, 2011
Time: 1:30 p.m.
Judge: The Honorable Richard Seeborg
Ctmm: 3, 17th Floor

1 In connection with their concurrently-filed Opposition to Defendant Electronic Arts, Inc.'s
 2 ("EA") Motion to Dismiss and Anti-SLAPP Motion to Strike, Plaintiffs Michael E. Davis, Vince
 3 Ferragamo, and Billy Joe Dupree respectfully request that this Court take judicial notice of the
 4 following materials and facts pursuant to Federal Rule of Evidence 201:

5 **I. DOCUMENTS**

6 1. Relevant portions of the Brief for Electronic Arts Inc. as Amicus Curiae Supporting
 7 the NFL Respondents in *American Needle, Inc. v. National Football League*, U.S. Supreme Court,
 8 Case No. 08-661, attached as Exhibit 4 to the Declaration of Brian Henri in Support of Opposition
 9 to EA's Motion to Dismiss & Motion to Strike ("Henri Decl.") submitted herewith.

10 2. Relevant portions of Electronic Arts Inc.'s Reply in Support of its Motion to
 11 Dismiss the Complaint Pursuant to Fed. R. Civ. P. 12(b)(6), dated September 18, 2009, in *Keller*
 12 *v. Electronic Arts Inc.*, Case No. CV-09-1967-CW (N.D. Cal.). See Henri Decl., Ex. 29.

13 3. The Declaration of Jeremy Strauser, dated August 7, 2009, and relevant Exhibits
 14 thereto, which was filed by EA in the case *James ("Jim") Brown v. Electronic Arts Inc.*, Case No
 15 2:09-cv-01598-DMG-RZ (C.D. Cal.) (Dkt. 30). See Henri Decl., Ex. 1.

16 4. Relevant portions of the Expert Report of Jill Hamburger, dated February 19, 2010,
 17 which was filed by EA in support of its opposition to the plaintiffs' class certification motion in
 18 *Pecover v. Electronic Arts Inc.*, Case No. 08-02820 VRW (N.D. Cal.) (Dkt. 108-1). See Henri
 19 Decl., Ex. 27.

20 5. The relevant portions of the Deposition Transcript of Jill Hamburger, dated
 21 February 26, 2010, from *Pecover v. Electronic Arts Inc.*, Case No. 08-02820 VRW (N.D. Cal.)
 22 (Dkt. 228-2). See Henri Decl., Ex. 28.

23 6. The relevant portions of the transcript of trial testimony of Joel Linzner, EA's
 24 Executive Vice President of Business and Legal Affairs, from *Parrish et al. v. National Football*
 25 *League Players Association et al.* (Case No. 07-0943 WHA) (N.D. Cal.) See Henri Decl., Ex. 23.

26 7. The License Agreement between Electronic Arts Inc. and the National Football
 27 League Players Incorporated ("Players Inc."), dated January 12, 2006. See Henri Decl., Ex. 14.

8. The License Agreement between Electronic Arts Inc. and the National Football Museum, Inc (dba The Pro Football Hall of Fame) and National Football League Players Incorporated, dated April 20, 2006. *See* Henri Decl., Ex. 15.

9. The Addendum to the License Agreement, dated March 1, 1998, between Electronic Arts Inc. and the National Football League Players Incorporated. *See* Henri Decl., Ex. 16.

10. Screen shot images of plaintiffs Michael Davis, Vince Ferragamo, and Billy Joe Dupree, attached as Exhibits 18-78 to the Declaration of Sony Barari in Support of Opposition to EA's Motion to Dismiss & Motion to Strike ("Barari Decl.") submitted herewith, from each yearly version ("Annual Version") released by EA for various gaming platforms ("Platform Editions") of the Madden NFL franchise :

2009 Sony PlayStation2 ("PS2"), Sony PlayStation Portable ("PSP), Nintendo Wii ("Wii"); Nintendo DS ("DS"), and Microsoft Xbox ("Xbox");

2008 PS2, PSP, Wii, DS, Xbox, Nintendo Gamecube ("Gamecube"), and Personal Computer ("PC");

2007 PS2, PSP, Wii, DS, Xbox, Gamecube, and PC;

2006 PS2, PSP, DS, Xbox, Gamecube, and PC;

2005 Sony PlayStation ("PS"), PS2, Xbox, Gamecube, and PC;

2004 PS, PS2, Xbox, Gamecube, and PC;

2003 PS, PS2, Xbox, Gamecube, and PC;

2002 PS, PS2, Xbox, and Gamecube;

2001 PS and PS2.

11. Excerpts from the 1979 Los Angeles Rams Media Guide. *See* Barari Decl., Exs. 10, 90.

12. Excerpts from the 1984 Los Angeles Rams Media Guide. *See* Barari Decl., Ex. 11.

13. Excerpts from the 1979 Tampa Bay Buccaneers Media Guide. *See* Barari Decl., Exs. 12,84.

14. Excerpts from the 1975 Dallas Cowboys Media Guide. *See* Barari Decl., Exs. 13, 96.

15. Excerpts from the 1977 Dallas Cowboys Media Guide. *See* Barari Decl., Ex. 14.

16. Excerpts from the Football Register, 1978 Edition (The Sporting News, 1978). *See* Barari Decl., Ex. 15.

17. Excerpts from the 1979 Dallas Cowboys Media Guide. *See* Barari Decl., Exs. 16.

18. Excerpts from the 1981 Dallas Cowboys Media Guide. *See* Barari Decl., Ex. 17.

19. The blog entry entitled, “Welcome to a new season of Madden NFL football,” by Ian Cummings, Creative Director for the Madden NFL franchise, dated February 7, 2010, which was posted on EA’s website at the web address

<http://maddennfl.easports.com/blog.action?blogId=superbowlblog>. *See* Henri Decl., Ex. 3

20. A printout from EA’s website www.ea.com at the web address

<http://www.forum.ea.com/eaforum/posts/list/91040>. *See* Henri Decl., Ex. 9.

21. A printout from EA’s website www.ea.com at the web address

<http://forum.ea.com/eaforum/posts/list/96443.page>. *See* Henri Decl., Ex. 10.

22. A printout from EA’s website www.ea.com at the web address

<http://www.ea.com/games/madden-nfl-08>. *See* Henri Decl., Ex. 30.

23. Printouts from EA’s website www.ea.com at the web address www.ea.com/1/legal- notices. *See* Henri Decl., Exs. 24, 31.

24. The relevant portions of the Official Guides For Madden NFL 01-09. *See* Henri Decl., Ex.7.

II. FACTS

25. Many versions of the Madden NFL franchise provide consumers with the option to select and play as current NFL players and teams or historical teams from past NFL seasons. Specifically, the following Annual Versions and Platform Editions of Madden NFL video game franchise contain historic teams:

2009 PS2, PSP, Wii, DS, and Xbox;

2008 PS2, PSP, Wii, DS, Xbox, Gamecube, and PC;

2007 PS2, PSP, Wii, DS, Xbox, Gamecube, and PC;

1 2006 PS2, PSP, DS, Xbox, Gamecube, and PC;
 2 2005 Sony PlayStation (“PS”), PS2, Xbox, Gamecube, and PC;
 3 2004 PS, PS2, Xbox, Gamecube, and PC;
 4 2003 PS, PS2, Xbox, Gamecube, and PC;
 5 2002 PS, PS2, Xbox, and Gamecube;
 6 2001 PS and PS2.
 7 See Barari Decl., ¶¶ 22-82, Exs. 18-78.

8 9 **MEMORANDUM OF POINTS AND AUTHORITIES**

10 **I. PRELIMINARY STATEMENT**

11 Federal Rule of Evidence 201 permits a court to take judicial notice of adjudicative facts,
 12 or any fact that is “not subject to reasonable dispute in that it is either (1) generally known within
 13 the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by
 14 resort to sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b).

15 Plaintiffs Michael E. Davis, Vince Ferragamo, and Billy Joe DuPree (“Plaintiffs”)
 16 respectfully request that this Court take judicial notice of (1) briefing, declarations, and expert
 17 reports filed by Defendant Electronic Arts Inc. (“EA”) in other actions before courts in the
 18 Northern and Central Districts of California and in the Supreme Court of the United States; (2)
 19 relevant portions of a transcript of the deposition of EA’s expert witness, Jill Hamburger, in an
 20 anti-trust matter regarding the Madden NFL video game before another court in the Northern
 21 District of California; (3) screen shots from specific Annual Versions and Platform Editions of the
 22 Madden NFL video game franchise; (4) media guides and reference materials for some of the
 23 historic teams at issue that list players’ characteristics and biographical information; (5) screen
 24 shots from EA’s website; and (6) “Official Guides” for the Madden NFL video games. In
 25 addition, Plaintiffs request that this Court take judicial notice of the fact that specific annual
 26 versions and platform editions of EA’s Madden NFL video games contain the historic team
 27 feature. Because the existence and content of each of these materials and facts are not subject to
 28 reasonable dispute and are capable of determination by reference to credible sources, judicial

1 notice is proper.

2
3 **II. ARGUMENT**

4 **A. The Court May Take Judicial Notice of Public Records Filed In Other Cases**
5 **Involving EA.**

6 “Matters of public record” outside of the pleadings are appropriate for a judicial notice on
7 a motion to dismiss. *See Lee v. City of Los Angeles*, 250 F. 3d 668, 688-89 (9th Cir. 2001); *MGIC*
8 *Indem Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986) (taking judicial notice of a motion to
9 dismiss and memorandum of points and authorities filed in another action). Moreover, Courts
10 routinely take judicial notice of records and filings from other courts. *See e.g., James v. Hubbard*,
11 2011 U.S. Dist. Lexis 57835, at *2 (E.D. Cal. May 31, 2011) (a court may take judicial notice of
12 court filings and matters of public record in ruling on a motion to dismiss); *Airframe Sys. Inc. v.*
13 *Raytheon*, 520 F. Supp. 2d 258, 262 (D. Mass. 2007) (taking judicial notice of court documents
14 filed in a previous case); *Jimenez v. Domino’s Pizza*, 238 F.R.D. 241, 246 (C.D. Cal. 2006) (taking
15 judicial notice of award of labor commissioner filed in another case, an opinion letter of the
16 Department of Labor Standards Enforcement, and several bankruptcy petitions); *Schweitzer v.*
17 *Scott*, 469 F. Supp. 1017, 1020 (C.D. Cal. 1979) (taking judicial notice of court records filed in
18 other civil actions).

19 Plaintiffs seek to have this Court take judicial notice of pleadings, declarations, trial
20 testimony, expert reports, portions of deposition testimony, and license agreements filed in other
21 actions involving EA pending before courts in the Northern and Central Districts of California and
22 the Supreme Court of the United States.¹ Because all of these documents are filed in other actions
23 and are matters of public record, judicial notice it proper. Each of the documents for which
24 Plaintiffs seek judicial notice is directly related to allegations in Plaintiffs’ First Amended

25 ¹ The unredacted License Agreement between EA and National Football League Players
26 Incorporated (“Players Inc.”), dated January 12, 2006, is not publicly available in its unredacted
27 form. However, there can be no question as to its authenticity as it was produced by Players Inc.
28 in response to a subpoena from Plaintiffs and is fully executed. Furthermore, a redacted version of
this agreement is publicly available from Pacer in *Parrish et al. v. National Football League*
Players Association Case No. 3:07-cv-00943-WHA (N.D. Cal.) (Dkt. 499).

1 Complaint ("FAC") and to positions EA has taken in its Motion to Dismiss and Anti-SLAPP
2 Motion to Strike.

3 In addition, Plaintiffs' "FAC" (Dkt. 11) quotes the relevant portions of EA's amicus brief
4 before the United States Supreme Court in *American Needle, Inc. v. National Football League*.
5 See FAC at ¶ 57. The FAC also refers to, but does not attach, the License Agreements. *Id.* ¶¶ 37
6 & 57. Because the Court "may consider documents whose contents are alleged in a complaint and
7 whose authenticity no party questions, but which are not physically attached to the [plaintiff's]
8 pleading," the Court may take judicial notice of these documents and their contents. *See Dunn v.*
9 *Castro*, 621 F.3d 1196, 1204 n. 6 (9th Cir. 2010)(quotation and citation omitted; alteration in
10 original); *In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 986 (9th Cir. 1999); *Baltazar v.*
11 *Apple, Inc.*, 2011 U.S. Dist. LEXIS 96140 at fn. 2 (N.D. Cal. Aug. 26, 2011); *see also* Fed. R.
12 Evid. 201(b)("The court may judicially notice a fact that is not subject to reasonable dispute
13 because it: (2) can be accurately and readily determined from sources whose accuracy cannot
14 reasonably be questioned").

15 **B. The Court May Take Judicial Notice of Screen Shots From Various Annual**
16 **Versions and Platform Editions of the Madden NFL Video Game Franchise.**

17 A court may properly take judicial notice of screen shots from materials relevant to the
18 motion at issue. *See Datel Holding's Ltd. v. Microsoft Corp.*, 712 F. Supp. 2d 974, 985 (N.D. Cal.
19 2010) (taking judicial notice of screen shot from the video game Mass Effect 2 "because it is
20 capable of accurate and ready determination using sources whose accuracy cannot be reasonably
21 be questioned"); *Baltazar*, 2011 U.S. Dist. LEXIS 96140 at n. 2 (taking judicial notice of screen
22 shots of Apple's website where the authenticity was not questioned); *In re Facebook PPC Adver.*
23 *Litig.*, 2010 U.S. Dist. LEXIS 136505, at *12 (N.D. Cal. Dec. 15, 2010)(taking judicial notice of
24 an "exemplary screen shot" of a web page advertisement as well as copies of "click-through"
25 agreements referred to in the complaint but not attached thereto).

26 Furthermore, Plaintiffs' FAC alleges that EA used the likenesses of Plaintiffs and the
27 proposed class of retired NFL players in various Annual Versions and Platform Editions of its
28 Madden NFL franchise but does not attach these games to the FAC. See FAC ¶¶ 2, 33, 75, 79, 85,

92, and 101. Because EA cannot reasonably dispute the authenticity of the screen shots and they can readily and easily be verified by reference to the video games, judicial notice is proper under the incorporation by reference doctrine. *See Dunn*, 621 F.3d 1196, 1204 n. 6; *In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 986; *Baltazar*, 2011 U.S. Dist. LEXIS 96140 at *fn.* 2; Fed. R. Evid. 201(b); *see also Datel*, 712 F. Supp. 2d. at 985.

C. The Court May Take Judicial Notice of the Media Guides Referred to In the FAC But Not Attached To It.

Plaintiffs' FAC alleges that EA used the likenesses of retired NFL players, including Plaintiffs, in its Madden NFL video games and that information for the "player models" within those video games matches the media guides for the teams being represented in the game. *See* FAC ¶ 39. Because the FAC specifically refers to the media guides, and their contents are publicly available and not subject to reasonable dispute, this Court may take judicial notice of the media guides for each of the teams that the Plaintiffs played for that are represented as historical teams in the Madden NFL video games. *See Dunn*, 621 F.3d 1196, 1204 n. 6; *In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 986; *Baltazar*, 2011 U.S. Dist. LEXIS 96140 at *fn.* 2; Fed. R. Evid. 201(b). Plaintiffs do not seek judicial notice that the information within the media guides is accurate. Rather Plaintiffs merely seek judicial notice of the information contained within the media guides so that Plaintiffs may demonstrate that historical players within the Madden NFL video games match the physical and biographical information for the players listed in the respective media guides.

D. The Court May Take Judicial Notice of Screenshots From EA's website.

The law is clear that Courts may take judicial notice of screenshots from the defendant's website. *See Baltazar*, 2011 U.S. Dist. LEXIS 96140 at *n.* 2; *In re Facebook PPC Adver. Litig.*, 2010 U.S. Dist. LEXIS 136505, at *12; *Datel*, 712 F. Supp. 2d. at 985 (holding court may take judicial notice of "printouts from the defendants' own website"). Accordingly, this Court may take judicial notice of the various screenshots from EA's website. The authenticity of the screenshots cannot be questioned.

E. The Court May Take Judicial Notice of the Official Guides for the Madden Video Games.

Plaintiffs request that this Court take judicial notice of the Official Guides for the 2006 through 2008 Annual Versions of the Madden NFL video games. Each of these official guides is publicly available and copyrighted by EA. *See* Henri Decl., Ex. 7. Because these “Official Guides” are not subject to reasonable dispute and their accuracy cannot reasonably be questioned, they are judicially noticeable. *See Dunn*, 621 F.3d 1196, 1204 n. 6; *In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 986; *Baltazar*, 2011 U.S. Dist. LEXIS 96140 at *fn.* 2; Fed. R. Evid. 201(b).

F. The Court May Take Judicial Notice of Which Annual Versions and Platform Editions of Madden NFL Video Games Contain the Historic Team Feature.

Finally, this Court may take judicial notice of the fact that the various Annual Versions and Platform Editions of EA’s Madden NFL video games listed above contain the historic team feature because such facts are “not subject to reasonable dispute [and are] . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b). Each of these games is in the public domain and the facts are verifiable from inserting the games into the necessary gaming platforms – which are also publicly available. Moreover, because EA created each of these video games, it cannot reasonably dispute the features contained within the games.

III. CONCLUSION

Based upon the foregoing authorities, Plaintiffs respectfully request that the Court take judicial notice of the documents and facts set forth above.

DATED: January 5, 2012

THOMAS WHITELAW LLP

By: /s/ Brian D. Henri

BRIAN D. HENRI

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